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6 UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8 OAKLAND DIVISION

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10 DOE 1, DOE 2, and KASADORE
11 RAMKISSOON, on Behalf of Themselves
12 and All Other Persons Similarly Situated,
13 Plaintiffs,
14 vs.
15 AOL, LLC,
16 Defendant.

Case No: C 06-05866 SBA

**ORDER TO SHOW
CAUSE RE DISMISSAL**

17 On September 22, 2006, Kasadore Ramkissoon, a New York resident, along with
18 unidentified California residents, Doe 1 and Doe 2, filed the instant putative class action
19 against AOL, LLC (“AOL”) in this Court. Compl. ¶¶ 5-7, Dkt. 1. The Complaint alleges
20 seven claims for: (1) violation of the Electronic Communication Privacy Act (“ECPA”);
21 (2) violation of the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code
22 § 1750, et seq.; (3) violation of the California Customer Records Act (“CRA”), Cal. Civ.
23 Code § 1798.80, et seq.; (4) violation of the California False Advertising Law (“FAL”),
24 Cal. Bus. & Prof. Code § 17500, et seq.; (5) violation of the California Unfair Competition
25 Law (“UCL”), Cal. Bus. & Prof. Code § 17200, et seq.; (6) unjust enrichment; and
26 (7) public disclosure of private facts. The pleadings aver that the Court has original
27 jurisdiction over Plaintiffs’ federal claims for violation of the ECPA and unjust enrichment,
28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiffs’ remaining state law causes

1 of action, id. § 1367. Compl. ¶ 2. Alternatively, Plaintiffs allege that the Court has
 2 diversity jurisdiction under 28 U.S.C. § 1332. Id. ¶ 3. As relief, Plaintiffs seek actual
 3 damages, statutory damages, punitive damages, declaratory relief, restitution and injunctive
 4 relief. Id. at 18-19.

5 On February 12, 2007, the Court dismissed the Complaint based on the forum
 6 selection clause contained in AOL's member agreement, which requires members to litigate
 7 any disputes with AOL in the state or federal courts of Virginia. Plaintiffs appealed, and on
 8 January 16, 2009, the Ninth Circuit reversed the Court's ruling and remanded for further
 9 proceedings. Doe 1 v. AOL LLC, 552 F.3d 1077 (9th Cir. 2009). Specifically, the court
 10 held that "the forum selection clause in the AOL member agreement is "unenforceable as to
 11 *California resident plaintiffs* bringing class action claims under *California consumer law*."
 12 Id. at 1084 (emphasis added).

13 After the case was remanded, AOL filed a motion to enforce the Ninth Circuit's
 14 mandate. Dkt. 82. Specifically, AOL moved to dismiss: (1) all claims brought by Plaintiff
 15 Ramkissoon because he is not a California resident and is not asserting any California
 16 consumer protection claims; and (2) any claims that are not based on California consumer
 17 law, i.e., the three claims for violation of the ECPA, unjust enrichment and public
 18 disclosure of private facts. On February 2, 2010, the Court granted AOL's motion and
 19 dismissed Plaintiffs' claims for violation of the ECPA, unjust enrichment and public
 20 disclosure of private facts without prejudice to refiling them in a Virginia state court.
 21 2/2/10 Order at 11, Dkt. 154. As a result of the Court's ruling, only four causes of action
 22 remained; i.e., Plaintiffs' claims under the CLRA, FAL, UCL and CRA.

23 On June 23, 2010, the Court granted in part and denied in part AOL's motion for
 24 judgment on the pleadings. 6/23/10 Order at 16, Dkt. 178. With respect to the second
 25 cause of action under the CLRA, the Court found that Plaintiffs could not seek damages
 26 because they had failed provide AOL with the requisite notice under California Civil Code
 27 § 1782(a). Id. at 9-10. The Court dismissed Plaintiffs' damages claim without prejudice to
 28 Plaintiffs' pursuing a damages claim upon satisfaction of the requirements set forth in

1 § 1782(a). The Court also dismissed Plaintiffs' cause of action under the CRA, with
 2 prejudice, but denied the motion for judgment on the pleadings with respect to Plaintiffs'
 3 remaining state law claims. Id.

4 The parties are now before the Court on Plaintiffs' motion for class certification.
 5 Before reaching the merits of that motion, however, the Court is obligated to examine its
 6 subject matter jurisdiction. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229 (1990);
 7 United Investors Life Ins. Co. v. Waddell & Reed, Inc., 360 F.3d 960, 966 (9th Cir. 2004).
 8 Here, all federal claims alleged in the Complaint have been dismissed. Under 28 U.S.C.
 9 § 1367(b)(3), “[a] district court may decline to exercise supplemental jurisdiction if it has
 10 dismissed all claims over which it has original jurisdiction.” Sanford v. MemberWorks,
 11 Inc., 625 F.3d 550, 561 (9th Cir. 2010) (quotation marks omitted). “[I]n the usual case in
 12 which all federal-law claims are eliminated before trial, the balance of factors to be
 13 considered under the pendent jurisdiction doctrine –judicial economy, convenience,
 14 fairness, and comity—will point toward declining to exercise jurisdiction over the
 15 remaining state-law claims.” Id. (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343,
 16 350 n.7 (1988)). Given these considerations, the Court’s inclination is to exercise its
 17 discretion in favor of declining to assert supplemental jurisdiction over Plaintiffs’ state law
 18 claims and dismiss them without prejudice to refiling said claims in a California court. See
 19 Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (court may sua sponte
 20 exercise discretion and dismiss state law claims under 28 U.S.C. § 1367(c)).¹

21 The above notwithstanding, the Court notes that the issue of supplemental
 22 jurisdiction may be moot to the extent that the Complaint alleges an independent basis for
 23 subject matter jurisdiction over the state law causes of action. As noted, the Complaint
 24 alleges that, “[i]n the alternative,” the Court has jurisdiction “pursuant to U.S.C. § 1332.”
 25 Compl. ¶ 3. It is unclear from Plaintiffs’ generic allegations whether they are referring to
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27 ¹ The Court also notes that this may be a case in which the state law claims
 28 substantially predominate over the claims upon which the district court had original
 jurisdiction. 28 U.S.C. § 1367(c)(2).

1 § 1332(a), which provides for diversity jurisdiction where the parties are citizens of
 2 different states and the sum in controversy exceeds \$75,000; or whether Plaintiffs were
 3 referring to § 1332(d), which sets forth the provisions of the Class Action Fairness Act of
 4 2005 (“CAFA”). Under CAFA:

5 The district courts shall have original jurisdiction of any civil
 6 action in which the matter in controversy exceeds the sum or
 7 value of \$5,000,000, exclusive of interest and costs, and is a
 8 class action in which

- 9 (A) any member of a class of plaintiffs is a citizen of a State
 different from any defendant;
- 10 (B) any member of a class of plaintiffs is a foreign state or a
 citizen or subject of a foreign state and any defendant is a
 citizen of a State; or
- 11 (C) any member of a class of plaintiffs is a citizen of a State and
 any defendant is a foreign state or a citizen or subject of a
 foreign state.

12 28 U.S.C. § 1332(d)(2). CAFA applies to “class actions,” which are specifically defined as
 13 “any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar
 14 State statute or rule of judicial procedure authorizing an action to be brought by 1 or more
 15 representative persons as a class action.” *Id.* § 1332(d)(1)(B).

16 The party seeking to invoke the jurisdiction of the federal court has the burden of
 17 establishing that jurisdiction exists. See Assoc. of Medical Colleges v. United States, 217
 18 F.3d 770, 778-79 (9th Cir. 2000). However, the Complaint fails to allege sufficient facts
 19 from which it can be determined whether jurisdiction under § 1332(a) or (d) exists.
 20 Although the Complaint alleges that Plaintiffs and AOL are citizens of different states, no
 21 amount in controversy is alleged. See Century Southwest Cable Television, Inc. v. CIIF
Associates 33 F.3d 1068, 1071 (9th Cir. 1994) (“Century failed, however, to allege the
 22 amount in controversy; the jurisdictional requirements of 28 U.S.C. § 1332, therefore, were
 23 not met.”); see also Reid v. American Traffic Solutions, Inc., No. 10-cv-204, 2010 WL
 24 5289108, at *7 (S.D. Ill. Dec. 20, 2010) (finding that plaintiff could not rely on CAFA to
 25 establish jurisdiction where he did not “assert CAFA as a basis for jurisdiction and [did] not
 26 include allegations to support CAFA jurisdiction.”).

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1 Evaluating whether the requisite amount in controversy is met in this case is further
2 complicated by Plaintiffs' abandonment of their claim for damages and the corresponding
3 decision to now seek declaratory and injunctive relief only. See Pl.'s Mot. at Class Cert. at
4 ("Plaintiffs are seeking certification only to pursue declaratory and injunctive relief....").
5 Although the cost of injunctive relief may be considered in calculating the amount in
6 controversy under CAFA where a plaintiff's recovery is below the jurisdictional threshold,
7 see In re Ford Motor Co., 264 F.3d 952, 958 (9th Cir. 2001), Plaintiffs herein offer no
8 indication as to what that value might be. In sum, it is unclear at this juncture whether a
9 basis for subject matter jurisdiction independent of 28 U.S.C. § 1331 is present.

10 Accordingly,

11 IT IS HEREBY ORDERED THAT the parties are directed to show cause why the
12 remaining state law causes of action should not be dismissed without prejudice for lack of
13 subject matter jurisdiction, and alternatively, why the Court should not decline to exercise
14 supplemental jurisdiction over those causes of action, pursuant to 28 U.S.C. § 1337(c)(2)
15 and (c)(3), in the absence of subject matter jurisdiction under 28 U.S.C. § 1332. Plaintiffs
16 and AOL may respond to this Order by submitting a memorandum, not to exceed ten (10)
17 pages, by no later than February 11, 2011. The hearing on Plaintiffs' motion for class
18 certification scheduled for February 1, 2011, is VACATED, and said motion shall be held
19 in abeyance pending the Court's resolution of the instant Order to Show Cause.

20 IT IS SO ORDERED.

21 Dated: January 31, 2011



SAUNDRA BROWN ARMSTRONG
United States District Judge

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